

A **PROTASCO BHD v. TEY POR YEE & ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
NALLINI PATHMANATHAN JCA
YAACOB MD SAM JCA
ZABARIAH MOHD YUSOF JCA

B [CIVIL APPEALS NO: W-02(IM)(NCC)-187-01-2017 &
W-02(IM)(NCC)-188-01-2017]
29 JANUARY 2018

C **ARBITRATION:** *Stay of proceedings – Principles applicable – Application under s. 10 of Arbitration Act 2005 – Stay of court proceedings pending arbitration – Whether stay of proceedings could be granted to non-parties to arbitration agreement – Whether court proceedings could be stayed pending resolution of arbitration – Whether arbitration clause in agreement between parties covered or encompassed all causes of action – Whether best for arbitration to be stayed until court proceedings determined – Whether consequences of staying arbitration meant only that it would be heard after court proceedings – Whether arbitration would be nullified – Whether relevant principles governing grant of stay of proceeding pending arbitration against non-parties properly considered to achieve just result*

E **CIVIL PROCEDURE:** *Stay of proceedings – Principles applicable – Application under s.10 of Arbitration Act 2005 – Stay of court proceedings pending arbitration – Whether stay of proceedings could be granted to non-parties to arbitration agreement – Whether court proceedings could be stayed pending resolution of arbitration – Whether arbitration clause in agreement between parties covered or encompassed all causes of action – Whether best for arbitration to be stayed until court proceedings determined – Whether consequences of staying arbitration meant only that it would be heard after court proceedings – Whether arbitration would be nullified – Whether relevant principles governing grant of stay of proceeding pending arbitration against non-parties properly considered to achieve just result*

G These appeals arose as a consequence of the decision of the High Court to grant a stay of proceedings to the respective respondents, pending arbitration of a dispute between the appellant ('Protasco') and Pt Anglo Slavic Utama ('PT ASU'). Briefly, the facts were that Protasco had brought a claim against PT ASU, the second defendant/respondent ('Tey') and the third defendant/respondent ('Ooi'). The dispute between Protasco and PT ASU was governed by an arbitration clause in the sale and purchase agreement executed, giving rise to an agreement to arbitrate in the event of any difference or dispute arising between them. As such, PT ASU was entitled to, and did obtain, a stay of the court proceedings between Protasco and itself pursuant to s. 10 of the Arbitration Act 2005 ('AA'). Subsequent to this, Tey and Ooi filed applications for a stay of the court proceedings pending the disposal of the arbitration proceedings between Protasco and PT ASU, which were allowed, based on the trial judge's decision that the issues and factual matrix of Protasco's claim against the three defendants/respondents were inter-related,

inter-connected and inextricably intertwined. Protasco's cause of action against Tey and Ooi was premised on deceit, fraud, conspiracy to defraud/injure, a contravention of ss. 131 and 132 of the Companies Act 1965 ('CA') and a breach of fiduciary duties. The crux of these appeals turned on the law governing a stay of proceedings in relation to non-parties to an arbitration agreement. In the instant case, only Protasco and PT ASU were bound by the arbitration agreement while Tey and Ooi were not bound and fell outside the scope of agreement. The main question was whether should the court of proceedings in relation to the claims made against them be stayed pending the arbitration between Protasco and PT ASU or should Protasco be allowed to proceed with the claim against the parties notwithstanding the arbitration proceedings. Protasco submitted that (i) a stay of proceedings in relation to non-parties to an arbitration agreement pending the outcome of arbitration proceedings should only be granted in rare and compelling circumstances; and (ii) Tey and Ooi, not being parties to the arbitration agreement, were not bound by any findings made in such arbitration proceedings. Tey and Ooi, however, contended that (i) the requirement to arbitrate between Protasco and PT ASU was mandatory, given the existence of the arbitration clause and thereby agreement, encapsulated in the sale and purchase agreement; and (ii) any concurrent proceedings in court mirroring the arbitration proceedings would give rise to a real possibility of inconsistent findings or decisions in each of the fora. The issues that arose were (i) whether the court proceedings by Protasco against Tey and Ooi should be stayed pending the resolution of the arbitration between Protasco and PT ASU; (ii) whether the arbitration clause in the agreement between the parties covered or encompassed all the causes of action brought against PT ASU; and (iii) the options available in relation to the arbitration between Protasco and PT ASU and the court proceedings between Protasco and Tey and Ooi.

Held (allowing appeals; setting aside decision of High Court)

Per Nallini Pathmanathan JCA delivering the judgment of the court:

- (1) As Tey and Ooi were not parties to the arbitration agreement, s. 10 of the AA does not come into play. The court's power to grant a stay is derived from its inherent power to stay court proceedings pending arbitration in the interests of the justice of the case. The dispute or difference arising between Protasco and PT ASU relates to a conspiracy to defraud/injure which would require ventilation, during the arbitration proceedings, of Tey and Ooi's alleged engineering and implementation of conspiracy. The cause of action in breach of contract would also touch on the facts relating to the parts played in the venture by Tey and Ooi as well as both parties' agents and/or nominees. To that extent, there was considerable overlap in the factual matrix giving rise to the breach of contract and the conspiracy to injure/defraud. On the other hand, any finding of a breach of contract or otherwise did not make Tey and Ooi liable personally. The issue of personal liability, if at all, was governed by the court initiated action that comprised the

- A subject matter of these appeals. Even if the arbitration were to proceed, Protasco would have to continue with the court initiated proceedings once the arbitration was completed, in order to prosecute Tey and Ooi personally. That would require an adjudication of the matter twice, as it were. (paras 49, 51 & 52)
- B (2) The stay of proceedings granted by this court pursuant to the application made under s. 10 of the AA by PT ASU encompassed the entirety of the dispute including that part of Protasco's claim relating to a conspiracy to defraud/injure as well as the imposition of a constructive trust. Therefore, no part of Protasco's claim against PT ASU fell to be considered in the civil proceedings, which were stayed pending arbitration. In effect, this meant that the claims premised on a breach of contract as well as the conspiracy allegations and the imposition of a constructive trust all fell to be determined by way of arbitration. This was clearly the intention of the parties when they entered into the agreement and must be given full effect. (para 61)
- C
- D
- E (3) The best option available in determining whether a stay of proceedings should be granted to the two non-parties to the arbitration agreement, namely Tey and Ooi, in relation to the claims made against them of, amongst others, a conspiracy to defraud/injure, breach of fiduciary duty and imposition of a constructive trust, was to stay the arbitration between Protasco and PT ASU until that part of the court proceedings as fell outside s. 10 had been determined. If the arbitration were to proceed prior to the court proceedings, the arbitrator was bound to consider the allegations of a conspiracy to defraud/injure as well as the imposition of a constructive trust against PT ASU only. In the course of doing so, it would be necessary for the arbitrator to consider the issues of a breach of fiduciary duty on the part of Tey and Ooi in order to determine whether a constructive trust ought to be imposed on PT ASU. Similarly, there would be a need to consider Tey and Ooi's positions and conduct in relation to the allegation of a conspiracy to injure/defraud. (paras 62-64)
- F
- G
- H (4) Tey and Ooi faced individually and in their personal capacities, a claim amounting to USD27 million. There was every likelihood that they would insist on being heard again in court in relation to their personal liability. Any denial of such a right might amount to a breach of natural justice. In these circumstances, it was not entirely tenable to conclude that any 're-litigation' of Tey and Ooi's evidence would definitively amount to an abuse of process. They were likely to be accorded the right to put forward their defences anew in the court proceedings. That would amount to duplicity in terms of evidence as well as resources. On the other hand, if the court proceedings were to be heard and adjudicated upon first, any findings of fact made in the High Court trial against Tey
- I

- and Ooi would be binding on the arbitrator. This did not interfere with nor impinge upon the arbitration as the agreement related solely to Protasco and PT ASU. (paras 72, 73 & 76) A
- (5) The consequences of staying the arbitration meant only that it would be heard after the court proceedings. The arbitration was not avoided or nullified in any way. On the contrary, the arbitration agreement was given full effect, only at a later stage. The non-granting of a stay to the non-parties did not affect the stay of proceedings order against PT ASU, save that the arbitration process did not commence until after the adjudication of the non-parties' claims in the High Court. Such a course was calculated to achieve the most just result between the parties. (para 86) B C
- (6) It was best that arbitration be stayed *vis-a-vis* Protasco and PT ASU until the court proceedings between Protasco and Tey and Ooi were determined. Ultimately, it was in the interests of justice that must prevail and this option appeared to best achieve that goal. However, Protasco was bound to arbitrate after the court proceedings and could not simply opt not to undertake its contractual obligation under the agreement. This court was therefore constrained to reverse the finding of the High Court Judge. His Lordship had erred in failing to give any reasoned considerations to the relevant principles governing the grant of a stay of proceeding pending arbitration against non-parties, nor the myriad factors to be taken into consideration, applied and weighed so as to achieve a just result. The trial judge had misdirected himself and it could not be said that his decision was the result of a proper and a judicial exercise of his discretion. The decision should therefore be impugned. Appellate intervention was justified. (paras 92-95) D E F

Bahasa Malaysia Headnotes

Rayuan-rayuan ini timbul akibat keputusan Mahkamah Tinggi membenarkan penangguhan prosiding kepada responden-responden, sementara menunggu timbang tara pertikaian antara perayu ('Protasco') dan PT Anglo Slavic Utama ('PT ASU'). Secara ringkas, faktanya adalah bahawa Protasco membuat tuntutan terhadap PT ASU tersebut, defendan kedua/responden ('Tey') dan defendan ketiga/responden ('Ooi'). Pertikaian antara Protasco dan PT ASU ditadbir oleh satu klausa timbang tara dalam perjanjian jual beli yang dilaksanakan, mengakibatkan satu perjanjian untuk menimbang tara sekiranya berlaku sebarang perbezaan atau pertikaian yang berbangkit antara mereka. Oleh itu, PT ASU berhak untuk, dan telah pun memperoleh, penangguhan prosiding mahkamah antara Protasco dan PT ASU menurut s. 10 Akta Timbang Tara 2005 ('ATT'). Berikutan itu, Tey and Ooi memfailkan permohonan untuk penangguhan prosiding mahkamah sambil menunggu pelupusan prosiding timbang tara antara Protasco dan PT ASU, dan ini telah dibenarkan, berdasarkan keputusan hakim bicara berkenaan isu-isu dan fakta matriks tuntutan Protasco terhadap ketiga-tiga defendan/ G H I

- A responden yang berkaitan, berhubungan dan berjalanan. Kausa tindakan Protasco terhadap Tey dan Ooi berdasarkan penipuan, konspirasi untuk mencurangi/menjejaskan, pelanggaran ss. 131 dan 132 Akta Syarikat 1965 ('AS') dan pelanggaran kewajipan fidusiari. Perkara utama rayuan-rayuan ini berpaling pada undang-undang mentadbir penangguhan prosiding
- B berhubungan yang bukan pihak dalam satu perjanjian timbang tara. Dalam kes ini, hanya Protasco dan PT ASU yang terikat dengan perjanjian timbang tara sementara Tey dan Ooi tidak terikat dan tidak termasuk dalam skop perjanjian. Soalan utama adalah sama ada prosiding mahkamah berhubungan dengan tuntutan-tuntutan yang dibuat terhadap mereka ditangguhkan sementara menunggu timbang tara antara Protasco dan PT ASU atau sama
- C ada Protasco harus dibenarkan meneruskan tuntutan terhadap pihak-pihak meskipun terdapat prosiding timbang tara. Protasco menghujahkan (i) satu penangguhan prosiding berhubungan yang bukan pihak perjanjian timbang tara sementara menunggu keputusan prosiding timbang tara hanya boleh dibenarkan dalam keadaan yang luar biasa dan memaksa; dan (ii) Tey dan
- D Ooi, yang bukan pihak kepada perjanjian timbang tara, tidak terikat dengan apa-apa dapatan yang dibuat dalam prosiding timbang tara. Tey dan Ooi, walau bagaimanapun, menghujahkan (i) keperluan untuk menimbang tara antara Protasco dan PT ASU adalah wajib, memandangkan kewujudan klausa timbang tara dan dengan itu perjanjian, yang terdapat dalam perjanjian jual
- E beli; dan (ii) apa-apa prosiding serentak di mahkamah yang mencerminkan prosiding timbang tara akan membangkitkan satu kemungkinan yang nyata tidak selaras dengan dapatan atau keputusan dalam setiap fora. Isu-isu yang timbul adalah (i) sama ada prosiding mahkamah oleh Protasco terhadap Tey dan Ooi harus ditangguhkan sementara menunggu resolusi timbang tara
- F antara Protasco dan PT ASU; (ii) sama ada klausa timbang tara dalam perjanjian antara pihak-pihak meliputi atau merangkumi segala kausa tindakan yang dibawa terhadap PT ASU; and (iii) pilihan-pilihan yang ada berhubungan dengan timbang tara antara Protasco dan PT ASU dan prosiding mahkamah antara Protasco dengan Tey dan Ooi.
- G **Diputuskan (membenarkan rayuan-rayuan; mengetepikan keputusan Mahkamah Tinggi)**
Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:
- H (1) Oleh kerana Tey dan Ooi bukan pihak dalam perjanjian timbang tara, s. 10 ATT tidak diguna pakai. Kuasa mahkamah membenarkan penangguhan berasal daripada kuasa sedia adanya untuk menangguhkan prosiding mahkamah sementara menunggu timbang tara dalam kepentingan keadilan kes. Pertikaian atau perbezaan yang timbul antara Protasco dan PT ASU berhubungan dengan konspirasi untuk menipu/
- I menjejaskan memerlukan ventilasi, semasa prosiding timbang tara, berkenaan dakwaan pelaksanaan konspirasi yang telah diaturkan oleh Tey dan Ooi. Kausa tindakan pelanggaran kontrak juga akan menyentuh fakta berhubungan dengan peranan yang dimainkan dalam usaha Tey

- dan Ooi serta ejen dan/atau calon kedua-dua belah pihak. Setakat itu, terdapat pertindihan yang banyak dalam matriks nyata yang membawa kepada kemungkiran kontrak dan konspirasi untuk menjejaskan/menipu. Walau bagaimanapun, apa-apa dapatan pelanggan kontrak atau sebaliknya tidak akan membuatkan Tey dan Ooi bertanggungjawab secara peribadi. Isu liabiliti peribadi, jika ada, ditadbirkan oleh tindakan yang dimulakan oleh mahkamah yang termasuk hal perkara rayuan-rayuan ini. Jika pun timbang tara diteruskan, Protasco akan meneruskan dengan prosiding mahkamah sebaik sahaja timbang tara selesai, bagi mendakwa Tey dan Ooi secara peribadi. Itu akan memerlukan adjudikasi hal perkara sebanyak dua kali. A
- (2) Penangguhan prosiding yang dibenarkan oleh mahkamah ini menurut permohonan yang dibuat bawah s. 10 ATT oleh PT ASU merangkumi keseluruhan pertikaian termasuk bahagian tuntutan Protasco berhubungan dengan konspirasi untuk menipu/menjejaskan serta pengenaan satu amanah konstruktif. Oleh itu, tiada bahagian tuntutan Protasco terhadap PT ASU akan dipertimbangkan dalam prosiding sivil, yang ditangguhkan sementara menunggu timbang tara. Ini bermaksud tuntutan-tuntutan berdasarkan pelanggaran kontrak serta dakwaan-dakwaan konspirasi dan pengenaan amanah konstruktif akan ditentukan melalui timbang tara. Ini dengan jelasnya adalah niat pihak-pihak apabila memasuki perjanjian dan harus diberikan kesan penuh. B
- (3) Pilihan yang terbaik dalam menentukan sama ada penangguhan prosiding harus dibenarkan kepada kedua-dua bukan pihak kepada perjanjian timbang tara, iaitu Tey dan Ooi, berhubungan dengan tuntutan yang dibuat terhadap mereka, antara lain, konspirasi untuk menipu/menjejaskan, pelanggaran kewajipan fidusiari dan pengenaan amanah konstruktif, adalah untuk menangguhkan timbang tara antara Protasco dan PT ASU sehingga bahagian prosiding mahkamah itu yang terjatuh di luar s. 10 ditentukan. Jika timbang tara diteruskan sebelum prosiding mahkamah, penimbang tara akan terikat untuk mempertimbangkan dakwaan-dakwaan konspirasi untuk menipu/menjejaskan serta pengenaan amanah konstruktif terhadap PT ASU sahaja. Semasa berbuat demikian, penimbang tara perlu mempertimbangkan isu-isu pelanggaran kewajipan fidusiari pihak Tey dan Ooi supaya dapat menentukan sama ada amanah konstruktif harus dikenakan ke atas PT ASU. Begitu juga, terdapat keperluan mempertimbangkan kedudukan dan kelakuan Tey dan Ooi berhubungan dengan dakwaan konspirasi untuk menjejaskan/menipu. C
- (4) Tey dan Ooi menghadapi secara individu dan dalam keupayaan peribadi mereka, tuntutan berjumlah USD27 juta. Mereka pasti akan mendesak untuk didengar semula di mahkamah berhubungan liabiliti peribadi mereka. Penafian hak sebegitu akan berjumlah pelanggaran keadilan asasi. Dalam keadaan ini, tidak boleh dipertahankan sepenuhnya untuk D
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- A membuat kesimpulan bahawa apa-apa 'litigasi semula' keterangan Tey dan Ooi akan dengan pastinya terjumlah kepada satu salah guna proses. Kemungkinan besar mereka akan diberikan hak untuk membuat pembelaan baru dalam prosiding mahkamah. Ini akan terjumlah kepada penduaan dari segi keterangan serta sumber-sumber. Walau bagaimanapun, jika prosiding mahkamah didengar dan diadjudikasi sebelum, apa-apa dapatan fakta yang dicapai di Mahkamah Tinggi terhadap Tey dan Ooi akan mengikat penimbang tara. Ini tidak akan mengganggu atau mempengaruhi timbang tara kerana perjanjian adalah berkaitan Protasco dan PT ASU sahaja.
- B
- C (5) Penangguhan timbang tara bermaksud ia hanya akan didengar selepas prosiding mahkamah. Timbang tara tidak akan dielak atau dibatalkan dalam apa jua cara pun. Sebaliknya, perjanjian timbang tara diberikan kesan sepenuhnya, hanya pada peringkat kemudian. Kegagalan memberikan penangguhan kepada bukan pihak tidak akan menjejaskan perintah penangguhan prosiding terhadap PT ASU, kecuali proses timbang tara tidak dimulakan sehingga selepas adjudikasi tuntutan bukan pihak di Mahkamah Tinggi. Cara sebegini adalah untuk mencapai keputusan yang paling adil antara pihak-pihak.
- D
- E (6) Adalah pilihan terbaik untuk timbang tara ditangguhkan *vis-a-vis* Protasco dan PT ASU sehingga prosiding mahkamah antara Protasco dan Tey dan Ooi ditentukan. Pada dasarnya, adalah penting untuk keadilan didahulukan dan pilihan ini adalah yang terbaik untuk mencapai matlamat ini. Walau bagaimanapun, Protasco terikat untuk timbang tara selepas prosiding mahkamah dan tidak boleh sewenang-wenangnya memilih untuk tidak menjalankan obligasi kontraknya bawah perjanjian. Mahkamah dengan itu terpaksa mengakaskan dapatan Hakim Mahkamah Tinggi. Beliau telah terkhilaf apabila gagal memberikan apa-apa pertimbangan yang munasabah kepada prinsip-prinsip relevan yang mentadbir pembenaran penangguhan prosiding terhadap bukan pihak sementara menunggu timbang tara, mahupun pelbagai faktor-faktor yang harus dipertimbangkan, diguna pakai dan dititikberatkan supaya dapat mencapai keadilan. Hakim bicara telah tersalah arah dan keputusannya bukan akibat pelaksanaan budi bicara yang wajar dan secara kehakiman. Keputusannya oleh itu sepatutnya dipersoalkan. Campur tangan rayuan adalah berjustifikasi.
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Case(s) referred to:

- Hi-Fert Ltd v. Kiukiang Maritime Carriers Inc* [1998] 159 ALR 142 (*refd*)
Jacob and Toralf Consulting Sdn Bhd & Ors v. Siemens Industry Software GmbH & Co & Ors [2013] 1 LNS 914 HC (*refd*)
KNM Process Systems Sdn Bhd v. Mission Biofuels Sdn Bhd [2013] 1 CLJ 993 HC (*refd*)
I *Linfield Ltd v. Taoho Design Architects Ltd and Others* [2002] HKCFI 513 (*refd*)
Mabey and Johnson v. Danos and Others [2007] All ER (D) 177 (*refd*)
Premium Nafta Products Limited And Others v. Fili Shipping Company Limited And Others [2007] UKHL 40 (*refd*)

Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd [2016] 9 CLJ 1 FC (*refd*) A
Reichhold Norway ASA and Another v. Goldman Sachs International [2000] 2 All ER
 679 (*refd*)
Tomolugen Holdings Ltd And Another v. Silica Investors Ltd and Other Appeals [2015]
 SGCA 57 (*refd*)

Legislation referred to:

Arbitration Act 2005, s. 10 B
 Companies Act 1965, ss. 131, 132

Arbitration Act 1996 [UK], s. 9

(Civil Appeal No: W-02(IM)(NCC)-187-01-2017)

For the appellant - S Sivaneindiren, Peter Skelchy & Joycelyn Teoh; M/s Cheah Teh & Su C

For the respondent - Effa Ruzanna Annuar & Lim Hui Li; M/s Raj, Ong & Yudistra

(Civil Appeal No: W-02(IM)(NCC)-188-01-2017)

For the appellant - S Sivaneindiren, Peter Skelchy & Joycelyn Teoh; M/s Cheah Teh & Su

For the respondent - Jamie Wong, New Sin Yew & Ng Yee Chien; M/s Jamie Wong D

[Editor's note: For the High Court judgment, please see *Protasco Bhd v. PT Anglo Slavic Utama & Ors* [2015] 1 LNS 1052 (overruled).]

Reported by Suhainah Wahiduddin

E

JUDGMENT

Nallini Pathmanathan JCA:

[1] These appeals arise as a consequence of the decision of the High Court to grant a stay of proceedings to the respective respondents in these appeals, pending arbitration of a dispute between the appellant and one PT Anglo Slavic Utama ('PT ASU'). F

[2] In the court below, the appellant who is the plaintiff ('Protasco') had brought a claim against the said PT ASU as the first defendant, Tey Por Yee ('Tey') as the second defendant and Ooi Kock Aun ('Ooi') as the third defendant. G

[3] The dispute between Protasco and PT ASU was governed by an arbitration clause in the sale and purchase agreement executed between them, giving rise to an agreement to arbitrate in the event of any difference or dispute arising between them. As such, PT ASU was entitled to, and did obtain a stay of the court proceedings between Protasco and itself *vide* an order of this court dated 25 February 2016, pursuant to s. 10 of the Arbitration Act 2005 ('AA'). H

[4] Subsequent to this, Tey and Ooi filed applications for a stay of the court proceedings on 25 March 2016 pending the disposal of the arbitration proceedings between Protasco and PT ASU. These applications were allowed by the High Court. It is this decision that comprises the subject matter of these appeals. I

A [5] Primarily, the basis for the learned judge's decision is that the issues and factual matrix of Protasco's claim against the three defendants are inter-related, inter-connected and inextricably intertwined.

B [6] The crux of these appeals turns on the law governing a stay of proceedings in relation to non-parties to an arbitration agreement. In the instant case, only Protasco and PT ASU are bound by the arbitration agreement. The other two defendants are not so bound. They fall outside the scope of the agreement. Section 10 of the AA is inapplicable in their context. So, should the court proceedings in relation to the claims made against them be stayed pending the arbitration between Protasco and PT ASU or should
C Protasco be allowed to proceed with the claim against the parties notwithstanding the arbitration proceedings?

D [7] The answer to this question turns primarily on the factual matrix of the case coupled with a balancing of the relevant factors and interests of the parties, so as to achieve a result which is manifestly just in all the circumstances of the case. The latter aspect is governed by a consideration of the law in relation to this issue. To that end, we shall first consider the factual premise of the case in relation to the defendants prior to the law.

Factual Matrix Relating To The Claim By Protasco Against The Defendants

E [8] The claim relates how Tey, in early November 2012, brought a proposal for investment to Protasco. Tey was at the time, the principal of a private equity management firm known as Global Capital Limited.

F [9] The proposal related to the acquisition of 76% of the total issued share capital of one PT Anglo Slavic Indonesia ('PT ASI') from PT ASU. PT ASI controlled 49% of another company known as PT FAS which in turn owned and controlled PT Hase Bumou Aceh ('PT Haseba'). This latter entity, PT Haseba had entered into a production management partnership with PT Pertamina ('Pertamina'), under which it was granted rights to develop and produce oil and gas in an oil field in Aceh, Indonesia. The proposal therefore
G envisaged that Protasco could control and benefit in a new venture in Aceh, Indonesia for the development and production of oil and gas from this oil field.

H [10] In late November 2012 (26 December 2012) Tey became a substantial shareholder of Protasco through the acquisition of 27.11% of its total issued share capital *vide* a corporate vehicle. As a consequence, Tey wanted and obtained representation on the board. His nominee for this purpose was Ooi, (the third defendant) who became a director of Protasco on 10 December 2012, some two weeks after Tey's acquisition of his shareholding.

I [11] Next, Tey introduced one Augustone Cheong Kwok Fai ('Augustone') to Protasco. Augustone held a power of attorney for PT ASU dated 15 October 2012. *Vide* this P/A executed by the President Director of PT ASU, Augustone was authorised to deal with all negotiations on behalf of PT

ASU for the purchase of the PT ASI shares culminating in a sale and purchase agreement. Accordingly, all negotiations with PT ASU were done through Augustone.

A

[12] Tey next proposed that Ooi represent Protasco in all negotiations relating to the purchase of the PT ASI shares from PT ASU.

B

[13] A first sale and purchase agreement was entered into between the parties on 28 December 2012, approximately two weeks after Ooi's appointment as a director and soon after the introduction of Augustone ('SPA1'). The purchase consideration for the shares amounted to USD55,000,000.

C

[14] An initial deposit of RM50 million was paid by Protasco to PT ASU on the signing of the first SPA. This was followed by due diligence. Further, to this several conditions precedent in SPA 1 could not be met within time and coupled with other factors, led to the signing of an amended and restated sale and purchase agreement ('SPA2').

D

[15] Under SPA2 the sale price was reduced and some other variations were made to the initial terms. The salient points about SPA2 are that PT ASU requested that the entire purchase price of USD22 million be payable upon the execution of SPA2. The initial deposit of RM50 million would be used to offset this sum. The completion of SPA2 was subject to the fulfilment of conditions subsequent within six months, failing which Protasco could terminate the agreement and refund the purchase price in full within 14 days.

E

[16] Protasco made the payment for the balance of the purchase price in accordance with SPA2. It also provided a shareholders' advance of USD5 million on the same date, a further term of SPA2. Acclaim Investments Limited, a third party, provided security (in the form of 297 million odd shares in a company known as PT Inovisi, in the British Virgin Islands).

F

[17] PT ASU failed to comply with the terms of SPA2, which envisaged *inter alia*, an extension of time in relation to the oil production agreement with Pertamina, for a period of ten years. After the purchase consideration had been paid, Protasco was informed for the first time that a term of only three years at best could be obtained. All other conditions subsequent were also not fulfilled.

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[18] SPA2 was terminated *vide* letter dated 4 August 2014. Protasco's board of directors had met earlier on 25 July 2014 to discuss the appropriate action to be taken and replies to be accorded to Bursa and the Securities Commission (SC) in respect of this failed, but substantial, transaction. All directors, including Tey and Ooi declared that they had no interest in SPA2. The board also decided to conduct an investigation into SPA2.

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I

A [19] Tey in this meeting is alleged to have strongly defended PT ASU, and contended that the three-year term proposed by it was sufficient to salvage the situation.

[20] The investigation committee found the following:

- B (a) Tey had brought the proposal for this transaction to Protasco through his vehicle Global Capital Limited;
- (b) The President Director of PT ASU, one Tjoe, had acted at all times as a nominee of Tey and Ooi; he had taken instructions from them in respect of all matters pertaining to SPA2;
- C (c) Tjoe had not received any of Protasco's letters during the negotiations leading up to the execution of SPA1 and SPA2;
- (d) Tey and Ooi were and remain the effective beneficial owners of PT ASU, PT Inovisi, Acclaim Investment Limited etc. Notwithstanding this, they had not disclosed their personal interests in PT ASI to Protasco as required by law;
- D (e) Tjoe had not received the letters issued or transmitted to him *vide* email because the email address given was the same as the address for another company known as Nextnation Communication Berhad where Tey and Ooi are the substantial shareholders;
- E (f) Tey and Ooi or through their agents had authored and forged the signatures of Tjoe on the PT ASU letters issued in reply to Protasco's letters;
- F (g) The third party that had provided security for the repayment of the deposit of RM50 million was linked to another partner and associate of Tey, namely one Andrew See and his wife;
- (h) See, Tey and Ooi are the partners of Global Capital Limited that had first introduced this transaction to Protasco;
- G (i) PT ASU, PT ASI, Acclaim and PT Inovisi are owned, related or the alter-ego of Tey and Ooi.

H [21] Premised on the foregoing, Protasco's cause of action against Tey and Ooi is premised on deceit, fraud, conspiracy to defraud/injure, a contravention of ss. 132 and 131 of the Companies Act 1965 ('CA') and a breach of fiduciary duties. Protasco further pleads that as a consequence of the foregoing, Protasco has suffered loss and damage in the sum of USD27 million. Accordingly, it contends that SPA2 between itself and PT ASU is null and void or illegal. A series of remedies is sought against Tey and Ooi in this respect namely that they are liable to:

- I (a) compensate Protasco in equity for the breach of fiduciary duties;
- (b) account to Protasco for the monies misappropriated by them;

- (c) account for secret profits held by them; A
- (d) hold all such monies as constructive trustees in favour of Protasco;
- (e) reconstitute assets held on trust for Protasco.

[22] In short, to recompense Protasco for the USD27 million loss it has suffered as a consequence of their acts. B

[23] As against PT ASU, Protasco's claim is premised on conspiracy to injure/defraud and the relief claimed is:

- (a) a declaration that all monies received by it through the defrauding of Protasco are held by it as a constructive trustee; C
- (b) damages for breach of contract;
- (c) damages for conspiracy and fraud;
- (d) declaration that SPA1 and SPA2 are null and void for breach of s. 132 of the CA or breach of public policy; D
- (e) a payment of USD22 million.

[24] It would appear from a reading of the statement of claim that the cause of action in breach of contract is secondary or ancillary to the primary claim of conspiracy to defraud. E

[25] The defence of Tey and Ooi states in summary that:

- (a) The true picture is that the Executive Vice Chairman and Group Managing Director of Protasco who is also the largest shareholder, one Dato' Sri Chong Ket Pen ('Dato' Chong') was the one who entered into an investor agreement with Global Capital Limited in November 2012. It is stated that it was Dato' Chong who invited Tey and Ooi as major investors in Protasco. F
- (b) The facts relating to Global Capital Limited through its affiliates and nominees procuring rights to develop and produce oil and gas in Aceh are then set out. Dato' Chong and Global Capital intended to jointly develop the project and a master agreement was supposed to be entered into. In consideration of this, Dato' Chong, it is contended, agreed to enter into the agreement for the acquisition of 27.11% of Protasco's equity from other shareholders. To this end Global Capital acquired that percentage of shareholding for a total consideration of RM96 million *vide* the agreement of 26 November 2012. This sum was fully paid for. G
- (c) Therefore, it was in furtherance of the investor agreement that Protasco and PT ASU entered into SPA1, namely to enable Protasco to diversify its business into oil and gas in Indonesia *vide* related companies. H
- (d) SPA1 was approved by Protasco's board of directors *vide* a circular resolution. No project papers pertaining to SPA1 were circulated for the I

- A Board's consideration. Neither was there a briefing to the Board nor a board of directors' meeting relating to the decision by Dato' Chong to enter into SPA1.
- B (e) Neither was the investor agreement of 3 November 2012 disclosed to the Board of Protasco. As such it is contended by Tey and Ooi that it was Dato' Chong who was in breach of his fiduciary duties in failing to disclose the terms of the investor agreement.
- C (f) Ooi further maintains that from his appointment as director on 10 December 2012 to payment of the deposit on 28 December 2012, there was no board meeting, nor documentation nor communication whereby he could have induced or caused the Board of Protasco to enter into SPA1 and make the payment of RM50 million. Any such representation or inducement, which resulted in Protasco entering into SPA1, was perpetrated by Dato' Chong or his son, Kenny Chong Ther Nen ('Kenny').
- D (g) As for the due diligence of SPA1 and the negotiations and entry into SPA2, the principal officers acting for and on behalf of Protasco were Dato' Chong and Kenny. They, therefore, had full knowledge and had participated in the preparation of SPA2. This is evident from correspondence and emails.
- E (h) Protasco was represented by a lawyer while PT ASU was not. Protasco also appointed several professional parties to conduct the due diligence. As such Tey and Ooi maintain that there could not have been inducement, misrepresentation, deception, cheating or fraud as
- F contended by Protasco, which caused the payment of USD27 million to PT ASU under SPA2.
- G (i) With respect to the tenure of the exploration and production of oil and gas, Tey and Ooi contend that Protasco knew that the concession was only until 14 December 2014. SPA2 reduced the purchase price to USD22 million but sought to extend the tenure by ten years while knowing full well that Pertamina's policy is to grant a contract for only two or three years.
- H (j) It is further contended that Protasco failed to reactivate the oil field or provide a business duration and drilling program for the oil field to facilitate any extension sought.
- I (k) Tey and Ooi maintain that the investigation conducted was a sham. At all material times, Ooi states that the representatives of Protasco namely Dato' Chong and Kenny were actively involved in the negotiation of SPA1 and SPA2 with PT ASU.
- (l) Further, there was no investigation report produced, no report of its findings to the board of directors nor any queries put to Tey and Ooi at all.

(m) The claim it is contended was filed at the behest of Dato' Chong after a board meeting convened to ratify his unilateral action. A

(n) Tey and Ooi's ownership of shareholding in PT ASU, PT Inovisi and Acclaim is wholly denied. Instead, they aver that it is Dato' Chong and Kenny who enjoy an interest in PT Inovisi *vide* one R S Maha Niaga Sdn Bhd, an entity they control. B

(o) They further aver that Dato' Chong Kenny and senior management of Protasco and its subsidiaries have financially benefited through illegal financial gains from the agreement between Protasco and PT ASU.

[26] In summary it is Tey and Ooi's defence that the entire transaction between Protasco and PT ASU was undertaken at the behest of, and with the full knowledge and consent of Dato' Chong and Kenny. C

[27] We are unable to consider precisely what issues fall for consideration in the arbitration, because arbitration proceedings have not been commenced notwithstanding the order of the Court of Appeal dated 25 March 2016. D

The Competing Contentions

[28] Learned counsel for Protasco and Ooi submitted at length before us on their competing contentions in relation to this issue. In summary, for Protasco, the contention is that: E

(a) a stay of proceedings in relation to non-parties to an arbitration agreement pending the outcome of arbitration proceedings should only be granted in rare and compelling circumstances;

(b) Tey and Ooi not being parties to the arbitration agreement are not bound by any findings made in such arbitration proceedings. F

[29] This approach reflects the approach taken in the United Kingdom based on the common law premise that a plaintiff is entitled to choose its forum and proceed against a defendant as it thinks best and such a right is not to be derogated from save in rare and compelling circumstances. This approach is also adopted in New Zealand. G

[30] For Tey and Ooi, it is contended that:

(a) The requirement to arbitrate between Protasco and PT ASU is mandatory given the existence of the arbitration clause, and thereby agreement, encapsulated in SPA2; H

(b) Any concurrent proceedings in court mirroring the arbitration proceedings will give rise to a real possibility of inconsistent findings or decisions in each of the fora.

[31] While this summary does little justice to the elaborate and comprehensive submissions put forward by learned counsel, it suffices as a bare outline. I

A The Law Relating To Whether The Court Proceedings By Protasco Against Tey And Ooi Should Be Stayed Pending The Resolution Of The Arbitration Between Protasco And PT ASU

B [32] We have considered the authorities submitted by both parties. The law in relation to the issue of staying proceedings against non-parties pending arbitration is not in substance different in the Commonwealth jurisdictions. However, the threshold to be applied in relation to the right of non-parties to proceed with their actions notwithstanding arbitration agreements, does vary.

C [33] In the United Kingdom, the threshold that has to be reached to warrant the grant of a stay of proceedings against non-parties pending arbitration, was considered by Lord Bingham of Cornhill CJ in *Reichhold Norway ASA and Another v. Goldman Sachs International* [2000] 2 All ER 679 (*Reichhold Norway*). That standard was stated to be:

- D** (a) Invoked in “rare and compelling circumstances”;
(b) There ought to be very strong reasons for granting such a stay;
(c) The benefits likely to result from granting such a stay of proceedings must clearly outweigh any disadvantage to the non-party.

E [34] (See also *Mabey and Johnson v. Danos and Others* [2007] All ER (D) 177, where the English High Court refused a stay against a non-party to the arbitration. There the allegations were fraud and conspiracy which bear a passing resemblance to the instant appeals. There the court highlighted the importance of hearing the “human witnesses” in a public forum in relation to the allegations of conspiracy and fraud. Another key factor that influenced the judge was that the non-party seeking the stay appeared to be taking advantage of the stay granted to the arbitrating parties to suggest that he would be unfairly prejudiced. The court rejected this contention. In the course of exercising its discretion the learned judge found that the facts did not fall within the “rare and compelling circumstances” envisaged in *Reichhold Norway*).

F

G

H [35] This threshold of “rare and compelling circumstances” was applied by Komathy Suppiah JC in the case of *Jacob and Toralf Consulting Sdn Bhd & Ors v. Siemens Industry Software GmbH & Co And Ors* [2013] 1 LNS 914 where it was held that the test to be utilised was not that of “special circumstances” but rather the “rare and compelling circumstances” test enunciated in *Reichhold Norway*. The learned judge reasoned that it was consistent with a fundamental rule that a plaintiff was not only entitled but required to prosecute his claim in court expeditiously and proceed with trial.

I [36] On appeal, this court did not disagree with the test applied by the High Court.

[37] In *Linfield Ltd v. Taoho Design Architects Ltd and Others* [2002] HKCFI 513 an application for a stay of proceedings by a non-party pending the outcome of arbitration proceedings the High Court in Hong Kong set out the principles to be adopted in determining whether a stay ought to be granted. In summary, it was held that the starting point would be the following question:

... What would serve the ends of justice between the parties to the litigation and as far as the administration of justice is concerned?

...

...

The guiding principles are: (1) that the stay must cause injustice to the claimant in the arbitration, and (2) that the applicant for a stay must satisfy the court that the continuance of the arbitration would be oppressive or vexatious to him or an abuse of the process of the Court: In short, that it would be unjust.

I would add that where a plaintiff institutes proceedings as of right (and not in breach of an arbitration agreement or exclusive jurisdiction clause) he is not to be deprived of carrying on those proceedings unless very good reasons exist to the contrary.

[38] The application for a stay was therefore dismissed. In arriving at this decision, the High Court was influenced by the fact that findings in any of the many arbitrations would, as a matter of law bind the parties to the court proceedings between them. Neither had the parties agreed to be bound by any findings in the arbitration proceedings between Linfield and any of the other arbitrating parties. The learned judge also accepted that in the course of the court proceedings many similar issues could arise and many similar facts would have to be dealt with in the proceedings against the various parties, but that such findings would not bind the parties to the court proceedings. As such there was simply no point in awaiting the outcome of the arbitral proceedings. It was further accepted that the risk of inconsistent findings might exist but this was unavoidable and was not a weighty factor that entered into the exercise of discretion in the circumstances of the case.

[39] In Australia, the decision of the Federal Court in *Hi-Fert Ltd v. Kiukiang Maritime Carriers Inc* [1998] 159 ALR 142 ('*Hi-Fert*') emphasises the importance of avoiding re-litigation in the course of determining whether a stay against non-parties should be granted. In that case, the plaintiffs were the consignee (Hi-Fert) and Cargill was the consignor of a shipment of wheat. The defendants were the charterer (WBC) and the owner of the vessel carrying the shipment. The shipment was found to be contaminated and could not be discharged at its destination port of New South Wales. The plaintiffs commenced court proceedings in Australia against the defendants in tort and contract. They also claimed against the charterer, WBC for misrepresentation and a contravention of the Australian Trade Practices Act 1974. WBC relied on an arbitration clause in the contract of affreightment

- A between itself and Hi-Fert and sought a stay of the court proceedings under the Australian arbitration statute. The arbitration clause required such proceedings to be arbitrated in London. The non-party, KMC also made a stay application pursuant to the court's inherent jurisdiction.
- B [40] It was held that the contractual claims by Hi-Fert against WBC fell within the scope of the arbitration clause in the contract of affreightment between them and therefore had to be stayed. However, the non-contractual claims were not caught by the arbitration clause.
- C [41] It was held that the best approach was to have both plaintiffs' claims against both defendants arbitrated in London so that they could run 'alongside' and be heard by a common arbitrator in respect of any indemnity claim that WBC might make against KMC as a consequence of the time charter. Therefore a stay was granted insofar as the proceedings related to contractual claims.
- D [42] But insofar as the non-contractual claims against WBC which did not fall within the arbitration agreement, no such stay was granted. It was reasoned that to have the arbitration proceeding in London in respect of the contractual claims against WBC and to have the non-contractual claims proceed by way of court proceedings in Australia would result in the litigation of similar issues in different tribunals. Parties might be required to litigate similar issues in two places. But that unfortunate result arose as a consequence of WBC invoking the provisions of the Australian arbitration statute.
- E
- F [43] In light of this, the High Court of Australia held that Hi-Fert having properly commenced proceeding in Australia was entitled to prosecute the proceedings against WBC and KMC in court. If they, ie, the plaintiff succeeded in the proceedings, there might be no need to pursue the contractual claims by arbitration in London. If they failed, then the contractual claims in London could be pursued.
- G [44] It was ordered that the appropriate course would be to impose a condition on the stay of the contractual claims that the reference to arbitration in respect of the contractual claims does not proceed until after the final determination of the proceedings in the Federal Court.
- H [45] The factor that seemed to weigh heavily in the outcome of Hi-Fert is that of avoiding re-litigation of the same issues and facts in different fora.
- I [46] In the Singapore Court of Appeal case of *Tomolugen Holdings Ltd And Another v. Silica Investors Ltd and Other Appeals* [2015] SGCA 57 ('*Tomolugen*'), numerous authorities in the Commonwealth were considered and analysed comprehensively. There were appeals against a judge's refusal to stay court proceedings in favour of arbitration. It related to an oppression suit. One of the defendants argued that part of the dispute in the court proceedings fell within an arbitration clause in a share sale agreement

between itself and the plaintiff and was subject to a mandatory stay. A stay of the remaining court proceedings was also sought pending the completion of the arbitration between itself and the plaintiff.

[47] In allowing the appeals and granting a stay of the court proceedings against non-parties pending arbitration, the Singapore Court of Appeal *inter alia*, opined that the grant of a stay of court proceedings to non-parties to the arbitration under the inherent jurisdiction of the court ought not, to be relegated to such a high threshold as the “rare and compelling circumstances” test articulated in *Reichhold Norway*.

[48] The decision of the Singapore Court of Appeal in *Tomolugen* is instructive as it studies the approaches adopted in several Commonwealth jurisdictions prior to arriving at the proper approach to be adopted in Singapore. This therefore affords us a bird’s-eye view of the approach adopted in several other jurisdictions enabling this court to consider the reasoning in these jurisdictions prior to determining the best approach to be taken in these appeals.

[49] Insofar as Tey and Ooi are concerned, as they are not parties to the arbitration agreement, s. 10 of the AA does not come into play. The court’s power to grant a stay is derived from its inherent power to stay court proceedings pending arbitration in the interests of the justice of the case. Therefore, the sole issue for consideration is whether the discretion ought to be exercised to allow a stay as sought by Tey and Ooi or to refuse such a stay as submitted by Protasco. At this appellate stage, the question before us is whether the learned judge exercised his discretion correctly in determining that a stay pending arbitration should be granted in respect of Protasco’s claims against Tey and Ooi.

[50] In *Tomolugen*, the Singapore Court of Appeal outlined the options available to a Singapore court when faced with court proceedings against non-parties, when there was a related arbitration. Those options afford a logical, and with respect, well-summarised series of choices available to a court faced with such an issue. The options as set out in *Tomolugen* and adopted here are:

- (a) to stay the whole of the court proceedings, including those against the non-parties or third parties to the arbitration proceedings, pending the determination of the arbitration. In other words, that the arbitration proceeds first, followed by the court proceedings. That was the option adopted by the learned judge of the High Court, and the option preferred by Tey and Ooi;
- (b) to stay the court proceedings to the extent required by s. 10 of the AA, but on condition that the arbitration proceeds only after the resolution of the remaining court proceedings. This means in effect that the court proceedings against the third parties or non-parties not caught by the

- A arbitration agreement would be heard and determined first, followed by the arbitration proceedings. This is the preferred option of Protasco, as we understand it;
- B (c) To stay the court proceedings under s. 10 in relation to the parties to the arbitration agreement, namely Protasco and PT ASU, and allow the remaining court proceedings against Tey and Ooi to proceed concurrently or in parallel. This means in effect that the arbitration and court proceedings would occur concurrently;
- C (d) To allow a stay of the court proceedings on certain issues, while allowing other issues to be concurrently determined by the court and in arbitration. (For example breach of contract to be stayed in court proceedings and heard by way of arbitration, while concurrently conspiracy to defraud/injure, lifting of the corporate veil, breach of fiduciary duty etc to be heard concurrently by the court).
- D [51] In deciding on these options, it is necessary to take into consideration and weigh up several competing factors relating to both the arbitration and the court proceedings, including:
- E (i) The overlap in parties in the proceedings and the arbitration - namely Protasco and PT ASU;
- F (ii) The overlap of the issues that will be raised in the arbitration. Here the arbitration has not commenced. In the absence of any material on this subject we surmise that the dispute or difference arising between Protasco and PT ASU relates to a conspiracy to defraud/injure, and breach of contract. The former, namely the cause of action premised on conspiracy to defraud or to injure will require ventilation, during the arbitration proceedings, of Tey and Ooi's alleged engineering and implementation of the conspiracy;
- G (iii) The cause of action in breach of contract will also, to a considerable extent, touch on the facts relating to the parts played in this venture by Tey, Ooi and Dato' Chong as well as both parties' agents and/or nominees. To that extent there is considerable overlap in the factual matrix giving rise to the breach of contract and the conspiracy to injure/defraud;
- H (iv) The principal witnesses for the primary parties in the arbitration namely Protasco and PT ASU may be the same actors, namely Tey, Ooi, and Dato' Chong. In order to establish these causes of action, the evidence of these persons will be necessary to establish the basic factual matrix in order to determine whether these causes of action are made out or not;
- I (v) The reliefs sought also bear some similarity save for the quantum claimed, namely USD22 million *vis a vis* PT ASU in the arbitration, and USD27 million in the court proceedings against Tey and Ooi

(in view of the shareholder's advance). There is also overlap in terms of the monies being held by PT ASU and/or Tey and Ooi as constructive trustees for Protasco.

A

[52] On the other hand, any finding of a breach of contract or otherwise does not make Tey and Ooi liable personally. The issue of personal liability if at all, is governed by the court initiated action that comprises the subject matter of these appeals. What this means in practical terms is that even if the arbitration were to proceed, Protasco will have to continue with the court initiated proceedings once the arbitration is completed, in order to prosecute Tey and Ooi personally. That will require an adjudication of the matter twice, as it were.

B

C

The Scope Of The Arbitration Clause In The Agreement Between Protasco And PT ASU

[53] Prior to determining the best option to be adopted, it is necessary to consider one significant issue namely whether the arbitration clause in the agreement between the parties covers or encompasses all the causes of action brought against PT ASU? Namely conspiracy to defraud/injure the imposition of a constructive trust as well as breach of contract, against PT ASU?

D

[54] The arbitration clause in the agreement provides that as between Protasco and PT ASU, "Any dispute arising out of or in connection with this agreement ... shall be referred to and finally settled by arbitration in Malaysia in accordance with the rules of the Kuala Lumpur Regional Centre of Arbitration for the time being in force ..."

E

[55] 'Agreement' appears to be defined in cl. 1.1 which provides in summary, for the sale and purchase of 78,750,000 ordinary shares representing 63% of the total issued and paid-up capital of PT ASI free from encumbrances, between Protasco and PT ASU.

F

[56] What then is the scope of the arbitral clause? Does it relate solely to issues arising under, or as a result of the agreement to sell the shares, or does it encompass disputes arising from pre-contractual inducements to enter into the agreement? This has bearing on the extent of the dispute that is subject to arbitration.

G

[57] Previously the courts from common law jurisdictions used to distinguish between "narrow" arbitration agreements where only disputes arising out of the contract were referred to arbitration and "wide clauses" that encompassed disputes out of the contract as well as those in connection with the contract. However, this view was put to rest in the decision of *Premium Nafta Products Limited And Others v. Fili Shipping Company Limited And Others* [2007] UKHL 40 more commonly referred to as "Fiona Trust". There the UK courts abandoned this line of authority.

H

I

A [58] Premised on s. 9 of the English Arbitration Act 1996, the House of Lords held that an arbitration agreement should be expansively construed. An assumption ought to be made that business people, in particular, are assumed to have entered into agreements to achieve some rational purpose. Secondly, it held that the parties as rational businessmen were likely to have intended any dispute arising out of the relationship into which they had entered to be decided by the same tribunal. Accordingly arbitration clauses were to be construed in accordance with this presumption unless the language made it clear that certain questions were intended to be excluded. The distinction between wide and narrow clauses was abandoned.

B
C [59] The position is even clearer in Malaysia by reason of s. 10 which grants a mandatory stay of court proceedings so as to give effect to the arbitration agreement. Applying *Fiona Trusts*, it follows that Protasco and PT ASU as rational business people would have wanted the entirety of their dispute determined by an arbitral tribunal and not just that part relating to a dispute arising out of the contract. In other words, both the conspiracy to injure/defraud and the imposition of a constructive trust dispute would be dealt with in any putative arbitration.

D
E [60] Our conclusion is fortified, and we are indeed bound by the decision of the Federal Court in *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd* [2016] 9 CLJ 1; [2016] 5 MLJ 417 in this respect. In that case, the apex court held that in determining the scope or precise nature of the dispute intended to be submitted to arbitration, the clause ought to be interpreted widely. The commercial purpose was of primary importance. In arriving at this decision, it was held that the approach adopted in the case of *KNM Process Systems Sdn Bhd v. Mission Biofuels Sdn Bhd* [2013] 1 CLJ 993 by Mohamad Ariff Yusof J (later JCA) was correct and approved accordingly.

F
G [61] It therefore follows that the stay of proceedings granted by this court pursuant to the application made under s. 10 of the AA by PT ASU encompasses the entirety of the dispute including that part of Protasco's claim relating to a conspiracy to defraud/injure as well as the imposition of a constructive trust. Therefore, no part of Protasco's claim against PT ASU falls to be considered in the civil proceedings, which are stayed pending arbitration. In effect, this means that the claims premised on a breach of contract as well as the conspiracy allegations and the imposition of a constructive trust all fall to be determined by way of arbitration. This was clearly the intention of the parties when they entered into the agreement and must be given full effect.

Options Available In Relation To The Arbitration Between Protasco And PT ASU And The Court Proceedings Between Protasco And Tey And Ooi

I [62] It follows that there are two options available in determining whether a stay of proceedings should be granted to the two non-parties to the arbitration agreement, namely Tey and Ooi, in relation to the claims made against them of, amongst others, a conspiracy to defraud/injure, breach of fiduciary duty and imposition of a constructive trust:

- (i) stay the court proceedings only to the extent required under s. 10 of the AA, as per the order of this court in relation to PT ASU, but on condition that the proposed arbitration proceed only after the resolution of the remaining court proceedings, ie, resolve that part of the court proceedings which falls outside s. 10 first; or A
 - (ii) stay the court proceedings only to the extent required under s. 10 of the AA insofar as PT ASU only is concerned, and allow the arbitration and the remaining court proceedings to run in parallel, namely a concurrent resolution of the arbitration involving Protasco and PT ASU, and that part of the court proceedings that fall outside s. 10, namely that part of the suit relating to Protasco versus Tey and Ooi. B
- C

[63] Of these two options, the former, namely staying the arbitration between Protasco and PT ASU until that part of the court proceedings as fall outside s. 10 has been determined, appears to be the better option. Our reasons for so concluding are set out below.

[64] If the arbitration were to proceed prior to the court proceedings, the arbitrator is bound to consider the allegations of a conspiracy to defraud/injure as well as the imposition of a constructive trust against PT ASU only. In the course of doing so, it would be necessary for the arbitrator to consider the issues of a breach of fiduciary duty on the part of Tey and Ooi in order to determine whether a constructive trust ought to be imposed on PT ASU. Similarly, there will be a need to consider Tey and Ooi's positions and conduct in relation to the allegation of a conspiracy to injure/defraud. D

[65] This means that it will be necessary for the arbitrator to make findings of fact in relation to these allegations against Tey and Ooi in order to arrive at any decision relating to the reliefs sought against PT ASU. Findings of fact on credibility and the part Tey and Ooi played or did not play in the factual matrix will come under intense scrutiny. E

[66] It is likely that the arbitrator will make findings of fact against the three main actors, as they will most likely be important witnesses in the course of the arbitration on behalf of PT ASU as well as Protasco. F

[67] It is open to Tey and Ooi to seek to challenge these findings made in the arbitration to which they were personally not a party and by which they would argue that they are not technically bound. If such a stance were adopted in the court proceedings, it is likely that it would be seen to be a re-litigation of matters already determined by the arbitral tribunal. Tey and Ooi might well argue that they were merely witnesses for the entities and were not accorded a full opportunity to defend themselves on a personal basis in respect of specific causes of action such as conspiracy to defraud. G

[68] The net result is that whatever the arbitrator's findings and final decision may be, such findings are not binding on Tey and Ooi in relation to the claims made against them in the court proceedings, unless they agree to be so bound. H

I

- A [69] There appears to be no basis to conclude that an agreement to be bound by the findings of the arbitrator is forthcoming from Tey and Ooi. The reality is that they face the court proceedings in their personal capacities in respect of the sum of USD27 million and are entitled to raise their defences against such claim in the court proceedings.
- B [70] As such it is entirely possible, if not probable, that the issues of a conspiracy to defraud/injure, breach of fiduciary duty and the imposition of a constructive trust would have to be re-heard and more significantly adjudicated afresh in any subsequent court proceedings. In short, the likelihood is that there will be a re-litigation of these same issues in the
- C subsequent court proceedings.
- [71] It cannot be argued that such a re-litigation would amount to *res judicata* because Tey and Ooi are not parties to the arbitration agreement. More significantly, the arbitrator's findings are not binding on the court. In this context, it has been pointed out in *Tomolugen* that any attempt to
- D "re-litigate" the same facts or issues in subsequent court proceedings may well amount to an "abuse of the process of the court".
- [72] However, in the context of our present facts, Tey and Ooi, as stated earlier, face individually and in their personal capacities, a claim amounting to USD27 million. There is every likelihood that they will insist on being
- E heard again in court in relation to their personal liability. Any denial of such a right might well amount to a breach of natural justice. In these circumstances, it is not entirely tenable to conclude that any "re-litigation" of Tey and Ooi's evidence will definitively amount to an abuse of process. They are likely to be accorded the right to put forward their defences anew
- F in the court proceedings.
- [73] That would amount to duplicity in terms of evidence as well as resources. These factors are of importance in determining whether the arbitration or the court proceedings should proceed first.
- G [74] In determining the best cause of action the following factors fall to be balanced. Of primary concern is the veracity of the evidence of these persons when given in arbitration, and then again in court proceedings, and which might be viewed as abuse, balanced against the right of a party to an action to be afforded a full and proper opportunity to defend serious allegations and
- H causes of action made against him personally and which carry grave consequences. The failure to accord a full opportunity to defend such causes of action might potentially result in a breach of natural justice on the facts of the instant case. The scales, to our minds, come down in favour of avoiding or precluding duplicity of evidence and findings by two separate fora. In other words, staying the arbitration pending the disposal of the
- I non-parties' claims in court appears to provide the most just as well as efficient way of dealing with the particular facts of the instant case.

[75] In this context, it is important to stress that each case will differ in terms of the factors to be considered and the weight to be accorded to these matters. It is not in every case that court proceedings of the non-parties should proceed first. In point of fact, court proceedings are often stayed *vis a vis* non-parties to enable the arbitration to proceed first, particularly where there is one plaintiff who has specifically contracted to arbitrate with one of the defendants. The factors weighing against such a cause of action in the instant case, as outlined above is the potential waste of resources and the duplicity of evidence, and possibly conflicting findings by each of the fora. Although it has been said that such duplicity may well arise in cases involving non-parties to the arbitration, and that no undue weight should be accorded to this factor, the factual matrix in the instant case would appear to be otherwise. Essentially, the fact that the arbitrator would have to effectively adjudicate on issues relating to a breach of fiduciary duty by Tey and Ooi resulting in the creation or imposition of a constructive trust, not to mention conspiracy to injure, means that there are likely to be findings of fact made against them in an effort to determine PT ASU's liability, if any.

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[76] On the other hand, if the court proceedings were to be heard and adjudicated upon first, any findings of fact made in the High Court trial against Tey and Ooi would be binding on the arbitrator. This does not interfere with nor impinge upon the arbitration as the agreement relates solely to Protasco and PT ASU.

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[77] Any findings of fact or in law would contribute towards a saving of time and costs in relation to the arbitration. Furthermore, to have the causes of action against Tey and Ooi in respect of a conspiracy to defraud/injure and breach of a fiduciary duty heard and adjudicated upon, will also accord some degree of finality as compared to proceeding with the arbitration first. It would facilitate the role of the arbitrator and the arbitration to arrive at a decision on the causes of action against PT ASU with greater ease.

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[78] Even if the court proceedings were to proceed on appeal, it is unlikely that an appellate court would lightly reverse findings of fact made by the trial court. While it is entirely possible that there may be reversals in terms of the law, it is a far more rare occurrence for the appellate courts to interfere with findings of fact. To that extent, any arbitrator or tribunal's reliance on the findings of fact made by a court would not be subject to doubt.

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[79] Another relevant factor is that, as stated earlier, the primacy of the claim against the PT ASU, the arbitrating party, as well as Tey and Ooi the non-arbitrating parties, turns on the allegations of a conspiracy to injure/defraud and the imposition of a constructive trust arising from the breach of fiduciary duty of Tey and Ooi. Tey and Ooi are alleged to be the primary parties to such conspiracy. To that extent, Protasco has legitimate basis to call all those involved in the alleged conspiracy to answer these allegations at the earliest opportunity.

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A [80] We considered the argument that the adjudication of the conspiracy to defraud/injure and constructive trust causes of action against Tey and Ooi in court proceedings might well effectively encompass or determine to some extent the causes of action covered by the arbitral agreement between Protasco and PT ASU and thereby amount to a circumvention of the arbitration agreement or the earlier order of this court.

B [81] It is true that findings of fact made against Tey and Ooi in the court proceedings would affect their evidence and testimony in arbitration. However, as examined and explained above, we are of the view that as either the arbitration against PT ASU, or the court proceedings against the non-parties should be dealt with first, the latter option appeared to offer the most advantages and the least confusion, duplicity and corresponding wastage of resources and time.

C [82] This court is empowered in the exercise of its inherent jurisdiction to determine which set of proceedings ought to proceed first (or in parallel) in order to achieve the most-just result for the parties. To this end, we further considered whether the arbitration parties would be prejudiced by a stay of the arbitration pending the resolution of the non-parties' claim. We noted that there is no question of a breach of contract cause of action between Protasco and Tey and Ooi. We also noted, as stated earlier, that the issues of conspiracy to injure/defraud and the imposition of a trust against PT ASU in the putative arbitration, would require a 'trawling' through of effectively those same causes of action against the non-parties in the course of the arbitration. Therefore, rather than prejudice the arbitration, the resolution of the matters relating to the non-parties should facilitate the arbitration. This would enable the arbitrator to concentrate on PT ASU and Protasco rather than Tey and Ooi in respect of whom the claims would stand adjudicated.

E [83] It may well be argued that the adjudication of Tey and Ooi's claims in the court proceedings will effectively determine the arbitration, thereby obviating or undermining the agreement to arbitrate. However, it did not appear to be a given consequence that a finding of liability or non-liability for or against Tey and Ooi in the court proceedings would automatically determine the entirety of Protasco's claim against PT ASU in any putative arbitration.

F [84] We also considered whether the staying of the arbitration pending the resolution of the non-parties' claims in court in any way undermined or obviated the earlier decision of this court. We are satisfied that that is not the effect of our present decision, as the earlier order of this court enforced s. 10 of the AA.

G [85] The earlier order only encompasses Protasco and PT ASU. There is no undermining or obviating of that order because the court proceedings against Tey and Ooi will not touch on Protasco's claim against PT ASU. That remains stayed. The court proceedings only relate to the non-parties.

[86] The consequence of staying the arbitration means only that it will be heard after the court proceedings. The arbitration is not avoided or nullified in any way. On the contrary, the arbitration agreement is given full effect, only at a later stage. The non-granting of a stay to the non-parties does not affect the stay of proceedings order against PT ASU, save that the arbitration process does not commence until after the adjudication of the non-parties' claims in the High Court. And such a course, in our view is calculated to achieve the most-just result between the parties.

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[87] Finally, we are cognisant that Protasco's right to sue while being a fundamental right, is not an absolute one. It may be stayed even against non-parties to an arbitration agreement.

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[88] We also considered the need to hold Protasco to its agreement to arbitrate *vis a vis* PT ASU. Protasco ought not to be allowed to evade or circumvent its agreement in this context.

[89] We also note, that as in *Tomolugen*, Protasco is the sole plaintiff and is bound to arbitrate the issues raised by it in its claim against PT ASU. To that extent, it cannot complain that its right to timely access to the court has been adversely affected. These factors were all considered and weighed.

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[90] However, as against this, it does not mean that just because Protasco's claim against PT ASU is stayed, it necessarily follows that the rest of the dispute against Tey and Ooi must necessarily be stayed as a matter of course. As reasoned in *Tomolugen*, which reasoning we respectfully adopt, the court is bound to strike a balance between the following considerations:

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- (a) The plaintiff's right to choose whom it wants to sue and where;
- (b) The court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause; and
- (c) The court's inherent power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes.
- (d) The balance that is achieved should be just in all the circumstances of the case.

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[91] We should also mention for completion that towards the close of parties' submissions, we invited learned counsel for both Protasco as well as Tey and Ooi to consider achieving some degree of consensus as to the litigation and arbitration of these claims, for example allowing for certain findings to be binding or for a statement of the proposed issues to be raised in the course of the putative arbitration. Parties were unable to achieve any degree of consensus. No concessions were forthcoming in respect of the overlap of issues or evidence etc.

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[92] Taking all these factors into consideration, and the fact that there is no indication whatsoever that the non-parties are agreeable to be bound by any findings that may be made by the arbitral tribunal, we are of the view

A that it would be best that the arbitration be stayed *vis a vis* Protasco and PT ASU until the court proceedings between Protasco and Tey and Ooi are determined. Ultimately, it is the interests of justice that must prevail and this option appears to best achieve that goal.

B [93] However, we make a clear note here that Protasco is bound to arbitrate after the court proceedings and cannot simply opt not to undertake its contractual obligation under the agreement.

C [94] We are therefore constrained to reverse the finding of the learned judge of the High Court. His Lordship erred in failing to give any or any reasoned consideration to the relevant principles governing the grant of a stay of proceedings pending arbitration against non-parties, nor the myriad factors to be taken into consideration, applied and weighed so as to achieve a just result. In summary, the learned judge simply concluded that such a stay against the non-parties, Tey and Ooi was warranted because the issues between PT ASU, Tey and Ooi “are so connected and intertwined”. He then
D went on to conclude that it was inevitable that the facts and issues in the court proceedings, would be considered and dealt with in the arbitration proceedings and *vice versa*. In light of the duplicity, he was of the view that the court proceedings should therefore be stayed. His Lordship was also of the view that if the stay against the non-parties was not allowed, this would
E have the effect of rendering the earlier order of this court academic. It would have the effect of circumventing the earlier order and would cause injustice to PT ASU.

F [95] We are not satisfied that the learned judge, with respect, assessed all the relevant material. The learned judge failed to consider the relevant case-law on the subject and to analyse the issues in the present case prior to arriving at his conclusion that a stay of proceedings as sought by Tey and Ooi was justified. His Lordship misdirected himself and it cannot be said that his decision was the result of a proper and a judicial exercise of his discretion. The decision should therefore be impugned. Appellate intervention is
G justified.

H [96] We therefore allow the appeals and set aside the decision of the learned High Court Judge allowing a stay of the court proceedings against Tey and Ooi. The net effect is that the suit/proceedings against Tey and Ooi only are to proceed to trial in the High Court. These proceedings are therefore remitted to the High Court for trial to be conducted as expeditiously as possible.

I [97] The arbitration proceedings between Protasco and PT ASU are temporarily stayed pending the disposal of the court proceedings in the High Court only, and may proceed immediately upon such adjudication of Protasco’s claim against Tey and Ooi.
